

I therefore allow the appeal with costs A here and in the court below. The order of attachment dated 10th November 1965 is set aside and the sum of \$1,400 deposited is to be returned to the defendant.

As to the appeal in respect of the compensation at page 21 of the appeal record it is noted that the defendant's counsel, in the course of his submission had stated:—

"I abandon claim for damages for wrongful attachment, if court finds attachment wrongful".

The defendant's counsel had filed an affidavit that he had not made such a statement and that what he actually said was that in the event of the court finding that the attachment was proper the claim for damages did not arise. Insofar as the learned president was concerned the claim for compensation had not arisen at all as he had found that the attachment was proper. Yet in his grounds of judgment he saw it fit to refer to the alleged abandonment of that claim and this clearly indicates that he was sure that the defendant's counsel had made that statement. I would therefore not make any award on that claim.

Appeal allowed.

Solicitors: Donaldson & Burkinshaw; E
Morris Edgar & Co.

ANG HOI YIN v. SIM SIE HAU

[O.C.J. (Lee Hun Hoe J.) November 25, 1968]

[Kota Kinabalu — Civil Suit No. 200 of 1968]

Practice and Procedure — Suit commenced by administratrix before extraction of grant of letters of administration — Competency — R.S.C. 1957, O. 16 r. 8 — Probate and Administration Ordinance (Sabah Cap. 109), s. 78.

Executors and Administrators — Administratrix — Grant of letters of administration not extracted — No qualifying status.

In this case letters of administration had been granted to the plaintiff in the estates of S.C.K. and S.K.M. but it had not been extracted. The plaintiff in her capacity as administratrix brought an action against the defendant. The defendant entered conditional appearance and applied to the court to set aside the writ for want of qualifying status on the part of the plaintiff.

Held: as the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and therefore the suit was a nullity and must be set aside.

Cases referred to:—

- (1) *Comptroller of Income Tax v. Yan Tai Min* [1965] 1 M.L.J. 255.
- (2) *P. Govindasamy Pillay & Sons v. Lok Seng Chai & Ors.* [1961] M.L.J. 89 at p. 91.
- (3) *Ingall v. Moran* [1944] 1 K.B. 160; [1944] 1 All E.R. 97.

(4) *Chia Faon Sian & Anor. v. Lam Chew Fah & Anor.* [1955] M.L.J. 185.

(5) *Re Haji Mohamed Amin Perak Administration* Petition No. 94 of 1934 (unreported).

(6) *Chia Teck Liang v. Tan Soo Khiong* [1936] M.L.J. 185.

CIVIL SUIT.

Michael K.M. Yong for the plaintiff.

Shelley Yap Yeok Siew for the defendant.

Cur. Adv. Vult.

Lee Hun Hoe J.: Having entered conditional appearance on 5th October, 1968 the defendant filed a notice of motion on 10th October, 1968 and moved the court to set aside the writ of summons for want of qualifying status on the part of the plaintiff.

In 1949 Sim Joo Mui was appointed administrator of the estates of Sim Chu Kwang and Sim Kia Mui under the Administration of Native and Small Estates Ordinance. He was the younger brother of Sim Kia Mui who died in Tawau in 1942 and he was the uncle of Sim Chu Kwang who died in China in 1937. The two estates seem to be tied up with the firm of Chop Peng Hong Company of Tawau. Many beneficiaries are interested in the two estates. Sim Joo Mui died on 4th September, 1963 without distributing the estates which by affluxion of time have enhanced in value.

The plaintiff applied for letters of administration *de bonis non* in respect of the estate of Sim Kia Mui under petition No. 53 of 1964 and of the estate of Sim Chu Kwang under petition No. 43 of 1966. In each of these petitions Seah Ah Puah alias Seah Hwa Joo entered a caveat. The matters thus become contentious. On 9th March, 1966 when both petitions came before Silke J. it was ordered that pleadings be delivered and proceed as an action under rule 19(2) (c) of the Probate and Administration Rules. This produced two suits, namely, Civil Suit No. 81 of 1966 and Civil Suit No. 82 of 1966. On 16th September, 1966, Silke J. dealing with a notice of motion in respect of Civil Suit No. 82 of 1966, made an order that Administrator-General, Sabah be appointed receiver in the said proceedings. On 23rd February, 1968 certain applications came before Harley J. in chambers and he made an order. The terms of the order reads:—

"UPON READING the summons in chambers dated the 7th February 1968 and the supporting affidavit of ANG HOI YIN (f) dated 4th October 1967, filed herein AND UPON HEARING STEPHEN YONG and MICHAEL YONG advocates for the applicant, ANG HOI YIN (f) and SHELLEY YAP advocate for the defendant SEAH AH PUAH (f) alias SEAH AH JOO (f) IT IS ORDERED that the Order made by the Honourable Mr. Justice Silke on the 16th September 1966 appointing the Administrator-General as receiver be discharged and that the money collected by him as receiver be paid into

court IT IS FURTHER ORDERED that the said Administrator-General file his accounts in triplicate in this court. AND IT IS FURTHER ORDERED that pending trial the said applicant, ANG HOI YIN (f) be appointed administratrix of the estate of SIM CHU KWANG, deceased and of the estate of SIM KIA MUI deceased. AND IT IS FURTHER ORDERED that the said administratrix file in court reports with copy to defendant on June 1st 1968, September 1st 1968 and every succeeding quarter thereafter until completion of trial. AND IT IS LASTLY ORDERED that the said administratrix pay moneys collected less expenses into court until judgment. Liberty to apply."

Mr. Shelley Yap for the defendant argued that although the court had made an order appointing the plaintiff as administratrix she had had not extracted the grant of letters of administration therefore she had not the qualifying status of an administratrix. He submitted that accordingly the plaintiff had no right to sue the defendant. In support of his contention he cited several authorities one of which is the case of *Comptroller of Income Tax v. Yan Tai Min*.⁽¹⁾ There the defendant entered conditional appearance and applied to strike out the writ of summons on the ground that the action brought against him as administrator was incompetent. The defendant had obtained an order for the grant of letters of administration to him of the estate of Yan Koon Wing deceased but he had not extracted the grant. Ali J. held that only on extracting the grant of letters of administration could a person be said to be duly clothed with a representative character and to have acquired a title to the estate so as to make him an administrator within the meaning of O. 16 r. 8 of the Rules of the Supreme Court. Therefore the defendant was not the administrator and the action could not be brought against him as administrator.

A similar question whether a person who had obtained an order from the registrar for the grant of letters of administration to issue could be sued in a representative capacity before the grant was extracted arose in the earlier case of *P. Govindasamy Pillay & Sons v. Lok Seng Chai & Ors.*⁽²⁾ Following the decision of *Ingall v. Moran*⁽³⁾ Ismail Khan J. (as he then was) said:—

"In my opinion, it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate."

In an earlier passage of his judgment he said:—

"I respectfully follow Lord Parker's observations in the case of *Meyappa Chetty v. Supramanian Chetty*, ([1916] 1 A.C. 603 at p. 609) quoted by the learned judge, 'An administrator, on the other hand, derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant;' in my opinion this also applies in the reverse. The representative capacity can only be proved by the production of the grant under seal or a certified copy thereof."

A In England it would seem that by virtue of the Administration of Estates Act an intestate's property vests in the President of the Probate Division until a grant of letters of administration is issued to someone. In Sabah such property would vest in the Administrator-General by virtue of section 30 of the Probate and Administration Ordinance (Cap. 109).

B On 17th September, 1942 the plaintiff in *Ingall v. Moran*⁽³⁾ issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act 1934, claiming to sue in a representative capacity as administrator of his son's estate. But he did not take out letters of administration until nearly two months after the date of the writ. The county court judge applied the doctrine of "relation back" and found for plaintiff. Allowing the appeal, the Court of Appeal held unanimously that the action was incompetent at the date of its inception by the issue of the writ and, that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration to the date of the intestate's death could not be invoked so as to render the action competent.

C D E An objection was taken that the affidavit sworn by Mr. Shelley Yap was bad because of paragraph 4 which reads:—

"The defendant in each case entered a caveat in respect of each of the petitions. The matter therefore became contentious."

F G Mr. Michael Yong for the plaintiff said that this was inaccurate and incorrect since defendant in the present case had never entered any caveat in any petition. Mr. Shelley Yap in reply said that the affidavit was perfectly correct and should not be read in isolation. Reference was made to paragraph 3 which reads:—

"The plaintiff filed two petitions in the High Court at Kota Kinabalu for letters of administration *de bonis non* of the Estate of Sim Chu Kwang (deceased) under Petition No. 43 of 1966 and of the Estate of Sim Kia Mui (deceased) under Petition No. 53 of 1964."

Then there is paragraph 5 which reads:—

H "When the two petitions came up for hearing before the Deputy Registrar of the High Court, Kota Kinabalu, they were referred to the Honourable the Judge in Court."

I The ambiguity, if any, arises only because the defendant in the present case is not the defendant in the two petitions mentioned whereas the plaintiff in the present case is also the petitioner in the two petitions. By itself paragraph 4 may convey a meaning which is never intended. It is incorrect and inaccurate if it meant "defendant Sim Sie Hau entered a caveat". But reading the affidavit as a whole particularly the three paragraphs abovementioned the meaning becomes quite clear. The defendant in

paragraph 4 obviously refers to respondent in the two petitions, namely, Seah Ah Puah *alias* Seah Ah Joo. The word "Petitions" in paragraph 4 can only be taken to refer to the two petitions mentioned in paragraphs 3 and 5 if it is to have any meaning. Sim Sie Hua was never a party to the two petitions and could not therefore be a defendant or more correctly respondent in each of the petitions. Any ambiguity would have been removed if the appropriate term was used or name added. Nevertheless I cannot say that the affidavit was defective as the meaning of paragraph 4 is clear when read with the other two paragraphs.

Mr. Michael Yong also referred to the question of relation back. I have earlier on mentioned this in passing in *Ingall v. Moran*.⁽³⁾ Once a grant of letters of administration has been obtained the title relates back so that the administrator may sue in respect of matters which have arisen between the date of death and the date of the grant. In the same way he may sue in respect of a cause of action that might have accrued to the intestate before his death provided it survives. Thus section 14 of the Probate and Administration Ordinance (Cap. 109) provides that letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration have been granted at the moment after his death.

In *Ingall v. Moran* ⁽³⁾ Luxmoore L.J. at pages 167, 168 and 169 made certain observations which apply aptly to the present case. I can do no better than to adopt them. He said:—

"The defendant has appealed to this court, and the only question arising in the appeal is whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff who can only sue in a representative capacity in an action started before the grant of letters of administration."

"The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor. If any authority is required it is to be found in the judgment of Lord Parker in *Chetty v. Chetty*. An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made and title thereto then relates back to the date of the intestate's death, but there is no doubt both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ."

"I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been ob-

A tained cannot be invoked so as to render an action competent which was incompetent when the writ was issued."

Mr. Michael Yong maintained that there was no necessity for the plaintiff to extract letters of administration because of the unique circumstances in this case. He said plaintiff applied for a general grant of letters of administration but this was refused. Instead the court appointed her as administratrix *pendente lite*. He then went on at some length to indicate the circumstances which resulted in the order of 23rd February, 1968. He submitted that the facts of those cases cited were different and distinguishable from the present case and that the provisions of the Sabah Probate and Administration Ordinance (Cap. 109) are different also. In particular he referred to section 47. Although he cited no authority he submitted that the order of 23rd February, 1968 is sufficient authority for plaintiff to sue. The Singapore case of *Chia Foon Sian & Anor. v. Lam Chew Fah & Anor.*⁽⁴⁾ tends to support this view. There letters of administration were granted to the plaintiff on 19th September, 1947 and extracted on 18th August, 1950. Whitton J. held that plaintiff acquired the character of administratrix on 19th September, 1947. If this view is correct then it means that the order of the court can take the place of a grant. Again in *Re Haji Mohamed Amin*,⁽⁵⁾ Perak Administration Petition No. 94 of 1934 Thorne J. held that an action against an administrator before the extraction of the grant of letters of administration was valid. Both these cases were dealt with in *P. Govindasamy Pillay & Sons v. Lok Seng Chai & Ors.*⁽²⁾ by Ismail Khan J. who did not agree with the decisions. I may add that I agree with the views expressed by Ismail Khan J.

Section 47 reads:—

"Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator other than right of distributing such estate; and every such administrator shall be subject to the immediate control of the court and shall act under its direction."

This section does not assist the plaintiff very much. In substance it is the same as English law which by section 163(1) of the Supreme Court of Judicature (Consolidated) Act, 1925 enacted that:—

"Where any legal proceedings touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any grant, are pending, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the court and act under its direction."

Tristram and Coote's Probate Practice, twenty-second edition, page 384, under the heading of issue of grant concerning administration *pendente lite* states:—

"If an order is made appointing an administrator, the practitioner should prepare and lodge at the Principal Probate Registry, the papers to lead the grant, i.e. the administrator's oath (form No. 173), an administration bond (form No. 61), affidavit of justification of sureties (form No. 24), a declaration of the estate (form No. 82), an Inland Revenue affidavit and the order on summons appointing the administrator. The grant is always of administration"

See also *Halsbury's Law of England*, 3rd Edition, Vol. 16, page 246, paragraph 459.

The question in this case is whether the order of 23rd February, 1968 is enough to clothe plaintiff as an administratrix without a grant of letters of administration. The answer in my opinion, is in the negative. The order states quite clearly that pending trial plaintiff be appointed administratrix of the two estates. The court has exercised its discretion in favour of plaintiff, widow of Sim Chu Kwang deceased. The order merely means that she is entitled to be appointed administratrix *pendente lite*. Until she obtains the grant she clearly cannot claim to act in a representative capacity. Therefore she could not properly described herself as administratrix in the writ of summons. In *Chia Teck Liang v. Tan Soo Khiong* ⁽⁶⁾ the assistant registrar made an order that letters of administration should issue to appellant but that letters had not been granted under seal in the form prescribed in accordance with section 70 of the Probate and Administration Enactment. Mills J. held that the order granting administration did not constitute a grant within the meaning of the section. In construing the section he used these words:—

"The court must hold, in my opinion, that the overriding words are 'grant the same under seal': it is quite clear that when the judge makes an order on the Bench to the effect that letters of administration shall issue to the petitioner, he does not make a grant under seal."

That precisely is the position in this case. The order of 23rd February, 1968 does not constitute a grant under seal in the form prescribed. Section 78 of the Probate and Administration Ordinance (Cap. 109) makes it clear. Subsection (2) of the section reads:—

"When it appears to the court that letters of administration to the estate of person deceased, with or without a copy of the will annexed, should be granted the court shall grant the same under its seal in the form prescribed."

From the authorities it seems clear that the law on the matter is the same whether a person sues as administrator or is being sued as such if he has not extracted letters of administration at the commencement of action. The writ must be regarded as a nullity from the

A beginning and be set aside. Perhaps the plaintiff may consider taking the matter higher where a binding decision would be welcome. But for myself for reasons given I would dismiss the plaintiff's action with costs.

Action dismissed.

KABATASAN TIMBER EXTRACTION CO. v. CHONG FAH SHING

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and MacIntyre F.J.) January 30, 1969]

[Kota Kinabalu — Federal Court Civil Appeal No. X75 of 1967]

Contract — Breach of — Damages — Duty to mitigate loss.

In this case the appellants had contracted to supply timber to the respondent to be delivered at the site of the sawmill to be erected by the respondent. The timber was delivered in three lots. The learned trial judge found that the 2nd lot of 198 logs and 4 of the 22 logs in the 3rd lot were not delivered to the respondent, as they were dumped at a distance of more than 500 feet from the sawmill. The learned trial judge gave judgment for the appellant for \$9,892.41 being the balance due under the contract and also awarded damages to the respondent on his counterclaim for breach of contract for the sum of \$13,192.40.

Held, dismissing the appeal in respect of the claim and allowing the appeal in respect of counterclaim by reducing the amount: it was the duty of the respondent in this case to take reasonable steps to mitigate the damage. There was no need for the respondent to have gone to the expense of buying logs from elsewhere when the logs were lying a few hundred feet away from the sawmill and all that was required was the additional expense for hauling them up to the sawmill. The appropriate damages to be awarded to the counterclaim was the approximate cost of hauling the logs to the sawmill, which amounted to \$1,000.

Cases referred to:—

- (1) *Brace v. Calder* [1895] 2 Q.B. 253.
- (2) *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581.
- (3) *Finlay (Fames) & Co. Ltd. v. N.V. Kwik Hoo Tong H.M.* [1929] 1 K.B. 400.
- (4) *Pilkinton v. Wood* [1953] Ch. 770.

FEDERAL COURT.

Michael K.M. Yong for the appellants.

Shelley Yap Yeok Siew for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: The appellants, the Kabatasan Timber Extraction Company, sued the respondent, a sawmiller, for a sum of \$40,129.31 being the alleged balance of the price of 41,069 cubic feet of timber sold and delivered under an agreement dated December 6, 1963. In his defence, the respondent admitted liability to the extent of \$2,044.81, but subject to a counterclaim for \$37,967.20 for damages arising from a breach of contract by the appellants. The learned trial judge found that the appellants